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In the Supreme Court of the United States

OCTOBER TERM 1991

RAYMOND I. KLAGISS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1. Whether the Indiana statute on neglect of a dependent, Ind. Code § 35-46-1-4(a)(1), is void for vagueness in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the method of enforcement by Indiana of its neglect of a dependent statute, Ind. Code § 35-46-1-4(a)(1), fails to adequately apprise a defendant of the charges against him in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether petitioner was convicted of a crime not charged given the failure of the indictment to factually allege, and adequately place petitioner on notice of, prohibited conduct for which he was charged in violation of the Sixth Amendment to the Constitution as applied to the states through the Fourteenth Amendment.

4. Whether petitioner was convicted on the basis of conjecture and speculation and not on proof beyond a reasonable doubt in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the adoption by the Indiana appellate courts of a "substantial evidence" standard of proof violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether the exclusion of exculpatory expert testimony proffered by petitioner on the issue of causation of decedent's injury denied him due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Indiana entered in the above case on March 11, 1992.

OPINION BELOW

The Supreme Court of Indiana did not issue an opinion in denying transfer and review from the Indiana Court of Appeals. Its order is appended. (App. A1) The opinion of the Indiana Court of Appeals (Fifth District) is reported at *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App., Jan. 30, 1992). (App. A2 (slip op.))

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on March 11, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1991).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the due process clause of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Indiana neglect of a dependent statute provides, in pertinent part:

> Neglect of a dependent—child selling.—(a) A person having the care of a dependent, whether assumed voluntarily or because of legal obligation, who knowingly or intentionally:
>
> (1) Places the dependent in a situation that may endanger his life or health;
>
> (2) Abandons or cruelly confines the dependent;
>
> (3) Deprives the dependent of necessary support; or
>
> (4) Deprives the dependent of education as required by law; commits neglect of a dependent, a class D felony. However, except for a violation of clause (4), the offense is a class B felony if it results in serious bodily injury. It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent. . . .

Ind. Code § 35-46-1-4 (1985).

> For purposes of the statute, "dependent" is defined as:
>
> (1) An unemancipated person who is under eighteen (18) years of age; or
>
> (2) A person of any age who is mentally or physically disabled. . . .

Ind. Code § 35-46-1-1 (1991).

STATEMENT OF THE CASE

Petitioner was convicted in the Superior Court of Marion County, Indiana on the second count of a two-count indictment charging neglect of a dependent. (R. 14; App. A16) The first count, charging petitioner with reckless homicide, resulted in a hung jury. (R. 9) The Superior Court sentenced petitioner to six years imprisonment. (R. 110)

Petitioner challenged, before the Indiana Court of Appeals and in his petition to transfer to the Supreme Court of Indiana, the constitutionality of the neglect statute for being void for vagueness. (Appellant's Brief, filed May 13, 1991, p. 42; Petition for Transfer, filed February 19, 1992, p. 8; Brief in Support of Pet. for Transfer, p. 32) The Court of Appeals rejected this argument. (slip op. 16; App. A14) Petitioner previously raised his crime not charged argument in the Indiana courts. (Appellant's Brief, p. 40; Pet. for Transfer, p. 7; Brief in Support, p. 26) The Court of Appeals did not address this question. Petitioner previously raised his sufficiency of the evidence argument. (Appellant's Brief, p. 36; Pet. for Transfer, p. 7; Brief in Support, p. 30) The Court of Appeals also rejected this argument. (slip op. 18; App. A15) Finally, petitioner timely raised his exclusion of exculpatory evidence argument in the Indiana courts (Appellant's Brief, p. 14; Pet. for Transfer, p. 3; Brief in Support, p. 8), which was rejected. (slip op. 10; App. A9)

Petitioner was born in Dago, Latvia in 1937 to a prominent land-owning family. His father received a degree in civil engineering but spent his time managing family enterprises. His mother, Jadviga Klagiss, was educated as a teacher. After Soviet forces invaded Latvia in 1941, his father went into hiding from the KGB. While trying to visit his own invalid mother, petitioner's father was

seized by the communists, beaten and stabbed, resulting in his death. Petitioners' mother found work as a teacher during the German occupation until 1944. With the advance of the Red army, she convinced a German colonel to give her and petitioner passage to Germany where they found refuge in a displaced person camp in Ohm. Thereafter, they entered the American zone and subsequently, through the assistance of the Catholic Church, found refuge in the United States.

Petitioner and his mother initially settled in North Dakota before moving to Indianapolis. Petitioner received his law degree from Indiana University, after which he clerked for the Chief Justice of the Indiana Supreme Court. He later served as a deputy attorney general of Indiana. Thereafter he entered the private practice of law. (R. 747-768)

Petitioner's current wife, Susan Klagiss, testified at trial on behalf of petitioner. Susan is a critical care nurse at Community Hospital in Indianapolis. She moved in with petitioner and his mother to help care for Mrs. Klagiss.[1] (R. 687) At the time Susan moved in, Mrs. Klagiss was quite demented. She would crawl around on all fours. She would sometimes scratch herself repeatedly. She took mellaril, an anti-psychotic drug. (R. 689-690) In January, 1988, Mrs. Klagiss was becoming incontinent and exhibited childish behavior. (R. 696, 703)

On the night Mrs. Klagiss died, Susan worked from 1:00 p.m. to 11:30 p.m. (March 8, 1988) and returned home about 12:15 a.m. Mrs. Klagiss had been sleeping most of the day. Susan, still awake in order to unwind after working, felt the need to arouse Mrs. Klagiss about 2:30 a.m. to feed her. Susan instructed petitioner to make oatmeal while she changed Mrs. Klagiss' diaper. Susan had put her dirty scrubs in the washer in the basement. While feeding Mrs. Klagiss, whom she had propped upright with pillows in the bed, Susan heard the washer stop and went downstairs to change the laundry. Petitioner followed her downstairs. Upon returning upstairs, they found Mrs. Klagiss having difficulty breathing and her fingers turning blue. Mrs. Klagiss then died. Susan then made Mrs. Klagiss presentable for family viewing, as is the practice in the hospital. (R. 704-730)

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[1]Petitioner's mother, Jadviga Klagiss, will be referred to herein as "Mrs. Klagiss" or "decedent."

Petitioner testified to the same events as his wife. (R. 796-808) He testified that he had tried to keep his mother independent as long as he could. (R. 781) He did not want his mother in a nursing home because of her difficulty in speaking English and due to the type of care she would receive there. (R. 744-745, 814-815) Petitioner's testimony as to his mother's condition was much the same as that of Susan and his former wife, Mary Klagiss. The testimony was that Mrs. Klagiss would stumble, fall and run into things. (R. 792) Petitioner tried to restrain her from hurting herself. (R. 839) He was her only living relative and she, his. The remainder of their family had been destroyed in the reign of terror in Latvia after World War II. (R. 994-995) Petitioner denied ever causing his mother any harm. (R. 802)

At 4:11 a.m. on March 9, 1988, the Indianapolis police received a call for a coroner. After arriving at 6184 Kingsley Drive in Indianapolis where Mrs. Klagiss died, deputy coroner Gray observed, per his testimony, that the decedent's room had been recently cleaned, and that while the carpet was soiled with human waste, an attempt to clean it had been made. He also observed a bowl on the floor with some oatmeal in it, a spoon, a glass and paper towels. (R. 188-193) The bed was urine-soaked, but the top cover of the bedding and decedent's clothing were fresh and clean. The decedent was wearing a pajama-type housecoat and a disposable diaper for adults. (R. 158) Gray testified that the body appeared to have been cleaned up and placed in a position in the middle of the bed, propped upon a pillow. The decedent's hands were placed over her abdominal area, her head was slightly turned, and her eyes were closed. The body was as found in a hospital or nursing home after death and cleaning by personnel. (R. 188-190) Gray did not know at the time that Susan Klagiss, petitioner's wife, was a registered nurse and worked in a hospital. (R. 203-204) There was no indication to Gray of the cause of death, wounds, or anything of that nature. (R. 183) There was bruising about the face, neck, and legs of the decedent, and around her eyes and cheekbone. The bruises that Gray observed were old bruises. (R. 194) Gray summoned police detective Judd Green concerning the death of a white female, age eighty. (R. 227-242)

Green observed no blood on the bed and nothing was blood-soaked. (R. 356-358) The body was placed in a large body bag and transported to the morgue. (R. 185)

Green took a video-taped statement from petitioner (State's Ex. 29). In the statement, petitioner restated events he had described to Green earlier. Petitioner related that he is an attorney, age 51. He had moved in with his mother on December 3, 1987 since she had been wandering around the neighborhood and the police did not want her left alone. She could walk, but only with assistance. Petitioner would try to straighten her up to walk straight. She could not control her bodily functions. On many occasions, she would not respond to conversation. Petitioner stated that he had never harmed his mother.

A next-door neighbor of decedent testified that in December, 1987 Mrs. Klagiss had been wandering around the neighborhood and was very disoriented. (R. 447-460) Mrs. Klagiss' physician, Dr. Robert Arthur, had diagnosed her as having organic brain syndrome. (R. 482) She also had osteoporosis, which he defined as "a natural consequence of aging wherein the body is not able to rebuild the bone structure as rapidly as it breaks it down." (R. 495) However, Dr. Arthur ran no tests to determine the extent of her condition. Decedent had old rib fractures which could have been caused by coughing, sneezing or falling. (R. 503) She also suffered from dementia and had difficulty in walking and thinking. (R. 507) Dr. Arthur testified that based upon the medical examiner's report, osteoporosis would not have caused Mrs. Klagiss' broken neck. (R. 488-491)

The forensic pathologist who conducted the autopsy on Mrs. Klagiss, Dr. Dean Hawley, testified that she died of a broken neck and that the injury was not caused by osteoporosis. (R. 564) He further testified that petitioner's merely straightening his mother's neck, as shown in the videotape (State's Ex. 29), could have caused the fracture. (R. 604) Dr. Hawley also testified that the sternum was fractured, but that it could have occurred in moving the body for the autopsy. (R. 606)

Two prominent medical experts were called by the defense. The first was Dr. Rashid Kahairi, a professor of endocrinology at the Indiana University Medical School, who testified that he does research in osteoporosis. He defined it as "a condition in which there is a gradual loss of bone, that predisposes to fracture on minimal or no trauma." (R. 855-7) He testified that it is most common in elderly females and in people of Eastern European descent. (R. 858) His opinion on the cause of decedent's broken neck was excluded by the trial court. (R. 866, 873)

Petitioner's second expert was Dr. Edwin Pontius, a distinguished pathologist who had taught the States' expert, Dr. Hawley, in medical school. Dr. Pontius testified to glaring discrepancies in the autopsy report. (R. 877-897) He also testified that decedent's bruises could have been caused by falling or bumping into things (R. 912), and that the eye injury could have been caused a day before Mrs. Klagiss' death. (R. 886-890) He further testified that the fracture of the neck could have been exaggerated by moving the body after death. (R. 923) He testified that with osteoporosis, the bones become quite fragile. His opinion on the cause of decedent's broken neck was also excluded. (R. 917)

Mary Klagiss, petitioner's first wife, testified for the defense. She is also of Latvian heritage and was well-acquainted with the decedent. (R. 648) Mary Klagiss, who is also a registered nurse and who is experienced in treating elderly patients in intensive care, has seen many patients with osteoporosis entailing pathological fractures. She said that such fractures "just happen." She testified that patients merely get up and their bones and hips are broken, and that they can break vertebrae in their sleep. (R. 655-658)

Mary Klagiss testified that in twenty-three years of marriage she had never seen petitioner abuse his mother nor had he abused her. (R. 648) She testified that petitioner gave his mother a lot of attention. (R. 663) In later years, his mother became senile and petitioner moved in with her because she could not care for herself. (R. 676-679)

An old friend of decedent, Zenta Thompson, a woman 77 years of age and also born in Latvia, testified to the loving relationship between petitioner and his mother. She testified that petitioner never abused his mother and took good care of her. (R. 629-635, 643) She further testified that Mrs. Klagiss had deteriorating health, stumbled a lot and even fell out of her chairs. (R. 636) She had known petitioner and his mother when they were all in a displaced person camp in Germany in 1944.

REASONS FOR GRANTING THE WRIT

The Indiana Court has decided important questions of law in a manner inconsistent with the Constitution and decisions of this Court, and contrary to the interests of justice.

The issues raised should be addressed by this Court because they will provide definition and guidance to those persons who commit themselves to home care of the elderly, particularly if that commitment arises out of a familial relationship. The elderly population, particularly those persons over eighty who seek the quasi-independence of remaining in their homes, is projected to substantially increase over the next two decades.[2] The degree of criminal liability to which caregivers in the home are exposed, which is what this case is about, could have a significant impact on the extent that home care will be provided in the future. A loosely constructed statute that gives a prosecutor, jury and judge unbridled discretion in determining what conduct exposes the caregiver to criminal liability will serve only to chill the provision of such care.

1. The statute under which petitioner was convicted, Ind. Code § 35-46-1-4(a), is so vague that a person of common intelligence cannot ascertain the conduct that is unlawful. It therefore violates the due process clause of the Fourteenth Amendment to the Constitution. The vagueness of the statute and the indictment against petitioner gave the jury virtually limitless discretion in determining the guilt of the accused. The prosecution's duty to prove guilt beyond a reasonable doubt was therefore rendered meaningless.

(a). The statute under which petitioner was convicted, in its original form, applied only to neglect of children. *See Worthington v. State*, 409 N.E.2d 1261 (Ind. Ct. App. 1980).[3] The

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[2]Hines, *Future Caregivers: Projected Family Structures of Older Persons*, Journ. of Gerontology, Vol. 47, No. 1, pp. 517-526 (1992).

[3]The *Worthington* case involved a constitutional challenge to Ind. Code § 35-14-1-4, the statutory predecessor to Ind. Code § 35-46-1-4, and related to abandonment of, cruelty to, and neglect of children. That statute was held not to be void for vagueness in *Worthington*. Therein, the Indiana court stated that the predecessor statute had to be read in conjunction with now-deleted statute Ind. Code § 35-14-1-2, which stated:

> Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child; (a) wilfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being. . . .

Indiana legislature enacted Ind. Code § 35-46-1-4 in 1975 and amended it in 1977, 1978, 1980 and twice in 1981. (Apps. A21-A25) In 1977, the statutory law was amended to specifically refer to neglect of a dependent and to dependents of any age who were mentally or physically disabled. 1977 Ind. Acts P.L. 340 §§ 84, 87. (Apps. A21-A22) Subsections 2, 3 and 4 of Ind. Code § 35-46-1-4 are specific in the standard of conduct proscribed. Subsection 2 relates to "abandonment" or cruel "confinement," subsection 3 relates to "necessary support," and subsection 4 relates to deprivation of education. The petitioner in this case, however, was charged and convicted under subsection 1 which makes unlawful "plac[ing] the dependent in a situation that may endanger his life or health."

In *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964), a statute regarding oaths was held invalid, with this Court saying:

> The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

In *American Seeding Machine Co. v. Kentucky*, 236 U.S. 660, 662 (1915), a Kentucky statute was held unconstitutional because the state court had "offered no standard of conduct that is possible to know." Likewise, in *Palmer v. City of Euclid*, 402 U.S. 544, 546 (1971), a statute was held void for vagueness. This Court said "the underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

In *Smith v. Goguen*, 415 U.S. 566, 578 (1974), this Court said:

> This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Such a provision simply has no core. This absence of any ascertainable standard

> for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and trier of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.

The instruction to the jury in the case at bar simply restated the words of the Indiana statute. (R. 71; Apps. A18-A19) The instruction on the burden of proof (R. 80; App. A20) offered no cure for the statute's vagueness and resulted in unbridled jury discretion. What was the neglect for which petitioner was convicted? The indictment charged petitioner for breaking his mother's neck, but under the instruction the neglect could have been the existence of urine in the bed, the bruises, the failure to be in a nursing home, or feeding her oatmeal. The instructions gave the jury the widest possible latitude.

Petitioner, the sole living relative of his mother, had moved in with her to care for her. The evidence was undisputed that her condition was that of an elderly woman nearing death. She was 80 years old with organic brain syndrome and osteoporosis. She was suffering from dementia with a limited ability to walk and no ability to control her bodily functions. (R. 468-510) The petitioner had, for moral and cultural reasons, opted to provide home care rather than commit his mother to a nursing home.

The underlying current of the prosecution's case running throughout the trial reflects the position of the State that it was criminal neglect to provide home care for Mrs. Klagiss rather than confine her to a nursing home. That, however, was one of only several avenues pursued by the prosecution in a broad sweep of evidence to prove criminal neglect. The jury was given a smorgasbord of possibilities upon which to convict petitioner.[4] The attempt

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[4]It appears from the record that the instructions were sent into the jury room (R. 88), but that the indictment was not. (R. 125, 150)

to convict him of breaking her neck obviously failed when the jury failed to reach a verdict on negligent homicide, as was charged in count one of the indictment. There was no way to know whether her neck had been broken while the body was being transported to the morgue, or before.

The jury in this case was left to speculate on whether petitioner had criminally neglected his mother and to use its own broad discretion to determine his role, if any, in her death. However, mere presence at the scene is not enough to sustain a conviction or uphold a statute. In *United States v. Romano*, 382 U.S. 136, 141 (1965), this Court held that mere presence was too tenuous to permit a reasonable inference of guilt. Yet that is what such an inference was predicated upon in the case at bar.

The opinion of the court below (Apps. A2-A15) does not clarify the statute, but merely adds to its vagueness. In this case the police detective, the prosecutor, the court, and the jury were free to impose upon petitioner their own personal philosophies as to the care and treatment due the elderly Mrs. Klagiss.

Persons in Indiana who provide home care to an elderly person such as Mrs. Klagiss must necessarily guess as to the meaning of this statute and how it will be applied by the prosecution, courts, and juries. The broad discretion that it provides places in jeopardy every person providing such care. The types of questions it raises are: Is keeping an elderly person at home and not in a nursing home neglect? Is straightening the body and walking the person neglect, given the presence of osteoporosis? Is helping an elderly person up by her wrists neglect?

Does the result in this case encourage "granny dumping" or the abandonment of elderly parents to the care of the state? Does it encourage the warehousing of the elderly in nursing homes? Was petitioner's choice of home care over a nursing home a fateful error that led to his imprisonment? The result in this case reflects a great moral disequalibrium. On the one hand the petitioner as a son felt the moral obligation to move in with and care for his mother. On the other hand he is punished because she died in his care.

This case raises grave public policy questions regarding the care of the elderly, which warrants this Court granting review. What are the public policy ramifications of maintaining an elderly

loved one in one's home rather than moving her to a nursing home?[5]

Given this moral disequalibrium and the public policy issues raised thereby, petitioner urges this Court to grant review.

(b) Count two of the indictment (R. 14; App. A16) simply does not state a crime under Ind. Code § 35-46-1-4. There are no factual allegations as to how petitioner allegedly placed his mother in a dangerous situation. In fact, the indictment is totally unclear as to what the "situation" is and what the "placing" is. It cannot be ascertained whether the indictment's statement of "fracturing and displacing [the] C6 vertebral body" is the "placing" or the "situation." Obviously, it cannot be both because the statute reads "places the dependent in a situation. . . ." Ind. Code § 35-46-1-4 (a)(1).

In *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), this Court said:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In Re Oliver*, 333 U.S. 257, 273, decided today, and cases there cited. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. Oregon*, 299 U.S. 353, 362.

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[5]Elderly preference for home care, in order to give them independence, was addressed in Hanley, Weiner & Harris, *Will Paid Home Care Erode Informal Support?*, Journ. of Health Politics, Policy and Law, Vol. 16, No. 3 (Fall 1991). *See also* Shaughnessy & Kramer, *The Increased Needs of Patients in Nursing Homes and Patients Receiving Home Health Care*, New Eng. Journ. of Med., Vol. 322, No. 1, p. 21 (1990); Batavia, DeJong & McKnew, *Toward a National Personal Assistance Program: The Independent Living Model and Long-Term Care for Persons with Disabilities*, Journ. of Health Politics, Policy and Law, Vol. 16, No. 3 (Fall 1991); Stone, *Caring Work in a Liberal Polity*, Journ. of Health Politics, Policy and Law, Vol. 16, No. 3 (Fall 1991).

In *Rabe v. Washington*, 405 U.S. 313, *reh. denied*, 406 U.S. 911 (1972), this Court reversed where a defendant's conviction was affirmed under a statute with a meaning quite different from the one he was charged with violating.

Petitioner's conviction was also affirmed under a statute with a meaning quite different from the one he was charged with violating. He was charged in the indictment with "fracturing and displacing" his mother's neck. (R. 14; App. A16) However, the instruction based upon the statute charged him with "placing the dependent in a situation that may endanger" his mother's life or health. This is a much broader charge to the jury than what was contained in the indictment. In preparing his defense to the indictment, petitioner could not have been able to anticipate the breadth of the charge outlined in the instruction. The Court of Appeals then broadened the matter further in its requirement that the state need only prove its case by "substantial evidence."

Under these circumstances, the charge states nothing and utterly fails to protect petitioner at trial against unknown issues. Thus, no crime is charged and petitioner's conviction runs afoul of the Sixth Amendment to the United States Constitution, which is applicable to the states through the due process clause of the Fourteenth Amendment. *See In re Oliver*, 333 U.S. 257, 273-4 (1948).

2(a). The conviction of petitioner was so devoid of evidentiary support that it is invalid under the due process clause of the Fourteenth Amendment. As held in *Thompson v. City of Louisville*, 362 U.S. 199 (1960), such a conviction cannot stand. In this case, the jury was left to speculate as to whether any conduct by petitioner contributed to his mother's death. Given the state of decedent's osteoporosis and overall health, she herself could have broken her neck by merely turning her head. There is no doubt that her bones were brittle.

In *Jackson v. Virginia*, 443 U.S. 307, 319, *reh. denied*, 444 U.S. 890 (1979), the standards in *Thompson* were elaborated upon. This Court said "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of the fact could have found the essential elements of the crime beyond a reasonable doubt." The Court said a mere modicum is not enough. At best, the prosecution in the case at bar produced a mere modicum.

What is not addressed in either *Thompson* or *Jackson* is the question of how much discretion can be constitutionally left in the hands of the jury. This Court has most recently addressed the question of jury discretion on the issue of punitive damages in civil cases. *See Pacific Mutual Life Insurance Co. v. Haslip*, ____ U.S. ____, 111 S. Ct. 1032 (1991). Certainly a jury should not be given greater discretion in a criminal case than a civil case, yet the jury in the case at bar was given such broad discretion. The instructions (R. 71, 80) in no way give the jury proper direction or constraints. It was free to speculate on the conduct that violates the act.

This Court should grant review to re-examine the principles of *Thompson* and *Jackson* in the context of the discretion given the jury in this case.

(b). The practical effect of the charge and the instruction was to compel the petitioner to prove that he did not cause his mother's death.

"The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). While the trial judge instructed the jury in the case at bar to find guilt beyond a reasonable doubt (R. 80; App. A20), the vagueness of the indictment (R. 14; App. A16) and the statute forced petitioner to prove that he did not neglect his mother.

The Indiana Court of Appeals in this case said:

> In order to establish that Klagiss violated I.C. § 35-46-1-4(a) in the manner charged in the indictment, the state had to produce *substantial evidence* that he: 1) had care of his mother either voluntarily or by operation of law; and 2) knowingly or intentionally; 3) placed her in a situation which endangered her life or health by fracturing and displacing her C-6 vertebral body. In order to elevate the crime to a class B felony, the state had to prove that the neglect resulted in serious bodily injury. (slip op. 17; App. A14) (emphasis added).

Substantial evidence is not proof beyond a reasonable doubt. Such an evidentiary standard is clearly repugnant to the due process clause. The Court of Appeals lowered the burdens imposed by the

trial court. The result is that in future cases the jury will be permitted unbridled discretion to speculate and reach a guilty verdict.

In *Barnes v. United States*, 412 U.S. 837, 842 (1973), this Court said:

> "... an inference is irrational or arbitrary, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend,"

quoting *Leary v. United States*, 395 U.S. 6, 36 (1969). The Court went on to say that "common law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience." 412 U.S. at 844. In the case at bar, the trial court and the Court of Appeals turned the burden of proof requirement on its head and essentially compelled petitioner to prove that he did not commit the crime.

The general instruction on burden of proof (R. 80; App. A20) is meaningless in light of the broad discretion given the jury to find guilt under the instruction reflecting the terms of the statute. (R. 71; Apps. A18-A19) In other words, the broader the discretion given the jury, the less significant is the burden of proof requirement on the prosecution. The broader the discretion given the jury, the greater the compulsion on a defendant to prove his innocence.

The question of jury discretion is one this Court should address in order to provide clarification of due process requirements. The proliferation of legislation such as the one at bar warrants this Court reviewing the question. The *Barnes* decision dealt with the statutory inference question. The questions presented by this case, which warrant this Court's review, deal with the broader question of presumptions that naturally flow from a vague statute and indictment and unlimited jury discretion.

3. The trial court excluded key testimony of two of petitioner's expert witnesses, Drs. Kahairi and Pontius, who would have offered expert opinions as to causation of decedent's neck injury. (R. 867, 918). If permitted, the two experts would have testified that Mrs. Klagiss' injury could have occurred when falling backwards from her kitchen table and that later, with minimal turning, the fracture would have been completed. (*Id.*; slip op. 4; Apps. A4-A5) Exclusion of this evidence infringed petitioner's right to offer ex-

culpatory evidence in his own defense in violation of the Fourteenth Amendment to the Constitution. The question warrants review in the interests of justice, since such exclusion was inconsistent with several decisions of this Court.

In *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), the Court elaborated on this right as measured against due process standards. Mr. Justice Powell, speaking for the Court, stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." The Court then quoted from its decision in *In Re Oliver*, 333 U.S. 257, 273 (1948), which held one's right to defend himself among the minimum essentials to a fair trial and thus within the protections of due process:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. [Citations omitted].[6]

In its *per curiam* opinion in *Green v. Georgia*, 442 U.S. 95, 97 (1979), this Court invoked the protection of the due process clause of the Fourteenth Amendment to allow the introduction of otherwise inadmissible exculpatory hearsay when the evidence was highly relevant to a critical issue in the punishment phase of the trial, substantial reasons existed to assume its reliability, and the state had considered the subject statement sufficiently reliable to use it in procuring the conviction and sentence to death of the declarant in a separate trial. The Court noted that "the hearsay rule

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[6]The right to present witnesses on one's behalf has been identified as fundamental in criminal cases arising from a wide variety of contexts, including establishing one's right to self-representation, *Faretta v. California*, 422 U.S. 806, 818 (1975) ("the calling and interrogation of favorable witnesses" to answer a criminal charge is "now considered fundamental to the fair administration of American justice"), and having the opportunity to have plea agreements honored by the prosecution, *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J. concurring, citing *Washington v. Texas*, 388 U.S. 14 (1967)).

may not be applied mechanistically to defeat the ends of justice." *Id.*, quoting *Chambers*, 410 U.S. at 302.

The law in Indiana regarding the posing of hypothetical questions to expert witnesses is as follows. Before an expert may give opinion testimony in the form of an answer to a hypothetical question, a two-fold foundation must be laid. First, the expert's ability to give such an opinion must be established through testimony showing he has the requisite knowledge, skill, education or experience on which to base the opinion, although firsthand knowledge of the facts is not required. *Henson v. State*, 535 N.E.2d 1189, 1191 (Ind. 1989). Second, a hypothetical question is proper if it embraces facts that have been placed into evidence, however it is not necessary that the question include all pertinent facts that are in evidence. If opposing counsel feels the facts included do not fairly include all pertinent facts in the record, the remedy is not exclusion of the expert's testimony but inclusion of such facts on cross-examination. *Id.*, 535 N.E.2d at 1192; *Davidson v. State*, 135 Ind. 254, 34 N.E. 972, 974 (1893).

There is no issue as to the qualifications of petitioner's two expert witnesses and their ability to opine upon the facts of this case.[7] However, the overly restrictive application of the second *Henson* factor regarding inclusion of record evidence into the propounded questions resulted in the exculpatory opinions of both doctors being excluded. The trial court's application of this test, and the Indiana Court of Appeals' affirmance thereof, is an unduly technical application of the state's expert examination procedure and runs afoul of the teachings of *Chambers v. Mississippi*.

The specific hypotheticals asked of petitioner's first expert, Dr. Kahairi, are set forth fully in the opinion of the Court of Appeals. (slip op. 4-6; Apps. A5-A6) Briefly stated, Dr. Kahairi's opinion on the cause of the injury to decedent's neck was excluded because both subject questions requested that he assume that there was no trauma to decedent's body other than injuries sustained a few days prior to her death resulting from a fall from her kitchen table.

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[7]The prosecution's objection that Dr. Kahairi had not reviewed decedent's medical records was properly overruled. (*See* R. 858-864) The prosecution did not object to having Dr. Pontius' curriculum vitae introduced and shown to the jury. (R. 880)

The court found that "the alleged absence of other trauma was not a fact in evidence." (slip op. 7; Apps. A7-A8) This is a *non sequitur*. The assertion that there was no other trauma was not purported to be a fact at all, but rather a limitation upon the matters which Dr. Kahairi was asked to consider. This is evident from petitioner's theory of the case, noted by the Court of Appeals, that decedent fractured her neck when she fell and hit her head some 10 to 12 days before she died, which injury was exacerbated during later movement of her body. (slip op. 4; Apps. A4-A5) Petitioner was clearly permitted to place a limitation on the matters for consideration under *Henson* and *Davidson*, and the prosecution would have been free to include such other facts desired during cross-examination.

The specific record evidence merits consideration given the trial and appellate courts' findings of a lack of evidence regarding decedent's fall, hitting of her head, and subsequent condition. As to testimony about when decedent fell, petitioner's videotaped statement played to the jury (State's Ex. 29) reasonably implies that the fall was approximately 10 to 12 days prior to death. The Court of Appeals quoted this passage (slip op. 8; App. A8) and found that petitioner failed to specify whether his temporal estimate of "10 to 12" was measured in "seconds, minutes, hours, days, weeks, months or years." However, any objective reading of the passage mandates the conclusion that petitioner's uncertainty related to the specific *number* of time units, not which time unit was applicable. It is patently unreasonable to suggest, as the Court of Appeals' opinion does, that petitioner could not differentiate between 10 seconds versus 10 years. The testimony of detective Judd Green, that petitioner told him that the fall occurred within a two week period prior to death (R. 284), is consistent with this interpretation. Given petitioner's uncertainty about the exact quantity of days, it was not improper for the hypothetical questions to be premised upon a fall occurring "a few days" prior to death.

The Court of Appeals found a lack of testimony that decedent struck her head during the fall. (slip op. 9; App. A9) However, Green testified the petitioner stated, in response to one of Green's questions about the broken neck, that he had observed that her head was wobbly after the fall. (R. 273) Furthermore, petitioner's transcribed statement, at pp. 40-41, states that decedent fell from the

dining table and onto the floor at a time "when she was really leaning her head back." (*See also* R. 726) As to decedent's condition after the fall, the hypothetical to Dr. Pontius asked that he assume that "she seemed to be alright after that, and got up, and . . . was able to ambulate." (R. 917) This is consistent with petitioner's transcribed statement at p. 41 that she could stand and walk after the fall. Although petitioner did state that her movements and coordination were not good generally (*id.*), this is plausibly normal for a woman 80 years of age.

In Indiana, if a hypothetical question posed to an expert witness is supported by some evidence or by reasonable inferences from the evidence, especially in view of proper instructions as to the weight to be given such testimony, the testimony must not be excluded. Additionally, a failure to prove part of the facts embraced in the question affects only the reliability and weight to be given the opinion and not its admissibility. *Chicago, I. & L.R.R., Inc. v. Freeman*, 284 N.E.2d 133, 136 (Ind. 1972). Here, direct evidence and reasonable inferences therefrom amply supported each element of the hypothetical questions posed. Furthermore, the jury was ultimately instructed on the weight to be given to expert testimony. (*See* Instructions 5, 9A; R. 68, 77; Apps. A18-A20)

The mechanistic application of the Indiana common law standards on admissibility in this case is most evident in the Court of Appeals' statement that because petitioner "never stated whether he was referring to seconds, minutes, hours, days, weeks, months or years, we cannot say this statement established any time frame for the alleged fall." (slip op. 8-9; App. A8) This statement could not more clearly demonstrate that the treatment afforded petitioner's hypothetical questions was an overly technical application of admissibility principles resulting in the exclusion of testimony critical to petitioner's defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated," the ends of justice are defeated by such an approach. *See Chambers v. Mississippi*, 410 U.S. at 302. The trial court erroneously excluded the opinions of Drs. Kahairi and Pontius and those rulings should not have been affirmed.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner prays that this Court issue a writ of *certiorari* to review the decision of the Supreme Court of Indiana.

Respectfully submitted,

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Dated: May 21, 1992

APPENDIX

RAYMOND I. KLAGISS
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INDIANAPOLIS IN 46220-0000

Cause Number
49A02-9008-CR-00478
LOWER CAUSE
49G038903CF33013

KLAGISS, RAYMOND VS STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 3/11/92 APPELLANT'S PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 11TH day of MARCH, 1992

/s/ Dwayne Brown
Clerk Supreme Court, Court of
Appeals and Tax Court

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IN THE
COURT OF APPEALS OF INDIANA
FIFTH DISTRICT

RAYMOND KLAGISS	)	
	)	
Appellant-Defendant	)	
	)	
vs.	)	No. 49A02-9008-CR-00478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John R. Barney, Judge
Cause No. 49G03-8903-CF-33013

SHARPNACK, J.

Raymond Klagiss appeals his conviction of neglect of a dependent, a class B felony pursuant to Ind.Code § 35-42-1-4. We affirm.

Klagiss lists five issues for review, which we restate as follows:

1. Did the trial court abuse its discretion in refusing to permit the defendant's expert witnesses to answer hypothetical questions concerning the cause of the decedent's fatal injury?
2. Did the court err in placing a video monitor in a manner that prevented Klagiss and his attorney from viewing videotaped testimony?
3. Did the court err in quashing a subpoena requesting a videotape prepared by a news organization which was not a party to this case?
4. Did inconsistencies in the testimony of one of the state's witnesses render the testimony inadmissible?
5. Is I.C. § 35-46-1-4 unconstitutionally vague?

Jadviga Klagiss and her son Raymond came to the United States in the 1950s in order to escape the rise of Communism in their native Latvia following the second world war. They eventually settled in Indianapolis, where Jadviga continued to live until her death. The defendant attended college and law school and eventually went into private legal practice in Indianapolis.

In the last years before her death, Jadviga suffered from a variety of physical problems, including osteoporosis, which were related to her advanced age. She occasionally was disoriented. In many ways, however, she was in good health and was very active for a person of her age in the last year before her death.

Klagiss moved into Jadviga's home some time before her death. Several weeks before Jadviga's death, Wayne Bruness, a former law associate of Klagiss, prepared documents deeding Jadviga's house to Klagiss and granting to him Jadviga's power of attorney.

At 3:30 a.m. on March 9, 1988, Kay Nimocks, a triage nurse at MetroHealth received a phone call from Susan Stewart (now Klagiss), a nurse with whom Klagiss was living in Jadviga's house.[1] Susan Klagiss asked Nimocks what to do with a patient who had no pulse, was not breathing, and whose fingers had turned blue. Nimocks told Susan to call the Marion County Sheriff's Department which would notify the coroner. Susan called the sheriff's department at 4:11 a.m., some forty-one minutes after she first called MetroHealth.

A deputy coroner was summoned to the scene to investigate Jadviga's death. The coroner noticed that Jadviga's body appeared to have been posed on the bed. Klagiss, Susan, and Bruness all protested that no one had disturbed the body after Jadviga's death. The coroner also observed that the bed was soaked with urine while Jadviga's bedclothing and the bedsheets were not, that Jadviga's room was quite dirty while the rest of the house was clean, and that there were numerous cuts and bruises on Jadviga's body. One of the cuts appeared to be new but was not bleeding. In addition, a bed sore was covered with a bandage which appeared to have been applied after death. When questioned about the condition of Jadviga's body and the condition of the room, Klagiss, Susan, and Bruness were unable to give any satisfactory explanation.

The coroner's office ordered that an autopsy be performed on Jadviga's body. On external examination, the body showed twenty-one separate injuries including the laceration of the eyelid and a variety of new and old bruises. The internal examination revealed that the sixth cervical vertebra was severed and completely displaced. As a result of this displacement, the larynx was crushed, the tissues surrounding the vertebra suffered severe hemorrhaging, and the spinal cord was effectively severed.

Klagiss argues that the trial court erred when it sustained the state's objections to hypothetical questions which he posed to two of his expert witnesses. As part of his defense, Klagiss advanced the theory that Jadviga, who suffered from osteoporosis, had fractured her neck when she fell and hit her head some ten to twelve days before she died. Klagiss theorized that the fracture of the ver-

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[1]Klagiss and Stewart married after Jadviga's death. We shall refer to Susan Stewart Klagiss as Susan Klagiss for purposes of this opinion.

tebra was exacerbated when Jadviga moved in her sleep on the night of her death causing the severance and displacement of the vertebra.

In support of this theory, Klagiss offered the testimony of Drs. Kahairi and Pontius. After being qualified as an expert, Dr. Kahairi testified that osteoporosis renders bones susceptible to fracture with little trauma. Counsel for Klagiss then asked him this hypothetical question:

> All right, Doctor assuming that we have an eighty year old lady. Assume this lady has osteoporosis. Assume that a few days before her death she fell backwards from the kitchen table, on a chair, and hit her head. Assume that she seemed okay after that, was still able to move around, but for the next few days spent most of her time in bed. Assume then that a few days later this lady dies, in bed, of a broken neck. And, that the . . between C-6 and C-7, the spine is completely separated. Do you have any opinion, sir, as to how that broken neck was caused? *Also assume sir, that there was no additional trauma to the lady.*

(Record, pp. 864-865) (emphasis added). The state objected to this question alleging that it omitted relevant facts. The court sustained the objection, and defense counsel made an offer to prove in which he asserted that the doctor would testify that the neck was fractured in the fall and exacerbated by any later movement of the head. Following this offer to prove, the court stood on its earlier ruling with the following explanation:

> I think you've assumed certain things that have not been shown. Eighty year old lady with osteoporosis. Broken neck between . . or at least around the C-6. *This court has not heard that there was no additional trauma.* This court has not heard about the pushing away from the table, and the falling back, and fracturing the neck. We heard that the deceased, at some point in time pushed back. This Court has not heard that after whatever time she did that; and we don't know when it is, that she seemed okay, and could move around, though

spent most of the time in bed. Those things are not in fact, in evidence.

(Record, pp. 868-869) (emphasis added).

The defense then attempted to rephrase the question:

> Doctor, I want to assume that we have an 80 year old lady. I want you to assume that this lady had a habit of falling. And I want you to assume that this lady had osteoporosis. I want you to assume that prior to her death, she had not only fallen from a table in the . . while eating; but also that she had been caught under a bed, crawled under a bed, and been caught, and had to be helped from under the bed. Specifically want you to assume that when she fell from the table while eating, that she hit her head. I want you to assume that she was still able to ambulate, and get around after that; but that she did spend a good deal of time in bed the last couple of days of her life. And, I want to ask you that . . . . I want to tell you then that the lady died of a broken neck, in bed. *And I want you to assume there was no further trauma.* Can you, Doctor, render an opinion as to how that lady's neck was broken?

(Record, pp. 873-874) (emphasis added). The state again objected, and the court again sustained the objection.

Later in the trial, Klagiss offered a second expert witness, Dr. Edwin Pontius. After establishing Dr. Pontius's credentials as a pathologist, defense counsel posed the following hypothetical question:

> Sir, I want you to assume certain facts. Assume sir, that we have an 80 year old lady. Assume that this lady had a case of osteoporosis. Assume that a few days before her death, she was sitting, eating at a table. That she fell over backwards, and hit her head. That she seemed to be all right after that, and got up, and uh, was able to ambulate. Assume that a few days later she was lying in bed, and assume that the lady dies. And,

assume that she died of a broken neck. Do you have an opinion, sir, as to what could have caused that broken neck?

(Record, pp. 916-917). The court sustained the prosecution's objection, and the defense made an offer to prove which the prosecution did not respond. The court did not change its ruling, and it stated, "The facts as stated in the hypothetical to Dr. Pontius, are not in evidence." (Record, p. 918).

The decision on whether to allow a hypothetical question falls within the sound discretion of the trial court, and we will reverse only where the trial court has abused its discretion. *Heald v. State* (1986), Ind., 492 N.E.2d 671, 678, *overruled on other grounds, Spradlin v. State* (1991), Ind., 569 N.E.2d 948. However, the defendant in a criminal case has a fundamental right to present exculpatory evidence. *Byrd v. State* (1991), Ind., 579 N.E.2d 457, 460. The trial court, therefore, abuses its discretion when it prevents a defendant from asking a witness a hypothetical question designed to elicit an exculpatory opinion if the witness has the knowledge, skill, education, or experience to answer the question and if there are facts in evidence to support the hypothetical. *Henson v. State* (1989), Ind., 535 N.E.2d 1189, 1191-1192 (*questioned on other grounds, Brinegar v. Robertson Co.* (1990), Ind.App., 550 N.E.2d 812, 820, Ratliff, C.J., concurring). The hypothetical is proper even if it does not include all the pertinent facts in evidence; to the extent that it omits pertinent facts, "the remedy is not exclusion of the expert's testimony but [inclusion of] such facts in questions on cross-examination." *Henson*, 535 N.E.2d at 1192. The trial court does not abuse its discretion in sustaining an objection to a hypothetical which is based on facts not in evidence. *Brandon v. State* (1979), 272 Ind. 92, 96-97, 396 N.E.2d 365, 370.

Here, the trial court properly sustained the state's objections to the hypothetical questions which counsel for Klagiss asked Dr. Kahairi. Both questions asked the doctor to assume that there was no trauma to Jadviga other than the supposed fall from a chair. There was no evidence, however, that this fall was the only trauma which Jadviga suffered. In fact, all the evidence presented by the defense suggested that she frequently fell and ran into things. On the record, the alleged absence of other trauma was not a fact in

evidence, and the objections were properly sustained under *Brandon*.

We reach the same conclusion with regard to the question asked of Dr. Pontius. While that question did omit the assumption concerning the lack of other trauma, it asked the doctor to assume: 1) that an eighty year old woman; 2) with osteoporosis; 3) fell backwards while eating at a table *a few days before her eventual death*; 4) *struck her head*; 5) *initially seemed all right and was able to walk*; 6) but later, while lying in bed, died; 7) of a broken neck. Klagiss believes that Susan's testimony and his recorded statement contain facts which support each element included in this hypothetical questions.

Despite the defendant's contentions, we find that there was no evidence that Jadviga fell within a few days of her death, that there was no evidence that she struck her head in the alleged fall, and that there was no evidence that she seemed "all right" after the alleged fall. In his statement, Klagiss never said that the alleged fall took place within a few days of Jadviga's death. The transcript reads:

Q. When was [the fall]?

A. This was in the last 10, 12, I can't pinpoint it right now —.

Q. — days?

A. I don't know, I don't know.

(Transcript of Recorded Statement, p. 41). In addition, Klagiss claims that Judd Green testified that Klagiss told him the alleged fall took place 10 to 12 days before Jadviga's death, and that this testimony supports the hypothetical. Green actually testified that Klagiss told him the alleged fall occurred within a two week period before the death. (Record, p. 284).

Because Klagiss never stated whether he was referring to seconds, minutes, hours, days, weeks, months, or years, we cannot say that this statement establishes any time frame for the alleged fall. Even if we were to construe the statement as urged by Klagiss, it would not support the hypothetical because the alleged fall would have occurred at least 10 days before Jadviga's death. Under such circumstances a hypothetical which stated that the alleged fall took place "a few" days before the death was and based on a fact not in

evidence. The same is true of Green's testimony. The statement that Klagiss told him that the alleged fall took place within a two week period before Jadviga's death does not support a hypothetical which is predicated in part on a fall which occurred within a "few days" of the death. The question as posed was simply misleading and based on a fact not in evidence, and the trial court did not abuse its discretion in sustaining the objection to it.

The hypothetical contained other facts not in evidence. It asked Dr. Pontius to assume that the decedent struck her head in a fall. No one testified that Jadviga struck her head in the alleged fall. Indeed, in his brief Klagiss makes no attempt to identify any testimony indicating that Jadviga struck her head. After examining the record, and in particular the recorded statement and testimony of Klagiss and the testimony of Susan Klagiss and Judd Green, we have found no statement that Jadviga struck her head in the alleged fall. Again, the trial court committed no abuse of discretion in sustaining the state's objection to a hypothetical question based on facts not in evidence.

Finally, the question asked Dr. Pontius to assume that the decedent was all right after the alleged fall. In his statement, however, Klagiss testified that Jadviga's movements were strange and her condition was "not so good" following the alleged fall. (Transcript of Recorded Statement, pp. 41-42). The hypothetical was thus based on facts not in evidence, and the trial court accordingly committed no abuse of discretion.

Klagiss next argues that the trial court committed an abuse of discretion when it denied his motion for a mistrial. Klagiss made his motion after the trial court allowed the jury to view two videotape exhibits. Klagiss complains that neither he nor his counsel were allowed to sit at the end of the jury box in order to view the tape as it was played. He claims that the trial court's procedure deprived his counsel of the ability to object to the contents of the tapes and violated his right to confront witnesses against him as guaranteed by the federal and state constitutions. U.S. Const. amend. VI; Ind. Const. art. 1 § 13.

The decision whether to grant or deny a motion for mistrial is committed to the discretion of the trial court. *Poling v. State* (1987), Ind., 515 N.E.2d 1074, 1080, *cert. denied*, 490 U.S.

1008, 109 S.Ct. 1646, 104 L.Ed.2d 161. We may not reverse the trial court in the exercise of its discretion unless the trial court reached a decision which was clearly erroneous—that is to say one which is against the logic and effect of the facts and circumstances of the case. *Bezy v. Loftus* (1991), Ind.App., 581 N.E.2d 965, 968. The denial of a motion for mistrial is not against the logic and effect of the facts and circumstances, and is therefore to be upheld on appeal, unless the defendant demonstrates that he was placed in a position of undue peril. *Morgan v. State* (1981), 275 Ind. 666, 671, 419 N.E.2d 964, 967.

Klagiss was not exposed to undue peril by the court's ruling denying his motion for mistrial. The record establishes without dispute that counsel for Klagiss was given the opportunity to view at least one of the tapes before trial, and Judd Green testified that counsel had viewed both tapes in Green's presence before trial. (Record, pp. 350-352).

As we noted earlier, the state placed both tapes into evidence during the direct examination of Green. Klagiss did not object to these tapes even though he had ample opportunity to do so. He cannot now make a serious claim that he was prejudiced because he could not object when the jury viewed the tapes. If Klagiss had any objections to the admissibility of the tapes, it was his duty to make those objections known to the court at the time the tapes were offered into evidence. *Suggs v. State* (1981), Ind., 428 N.E.2d 226, 229. Because he made no objection at that time, Klagiss waived the right to object later. *Id.* A defendant may not object to evidence which is already admitted into the record. Because the evidence was already admitted into the record, Klagiss could not make a sustainable objection and he could not have been prejudiced by a physical arrangement which arguably might have impaired his ability to object.

Klagiss also fails to show that his right to confront witnesses against him was violated when he and his attorney were prevented from sitting at the end of the jury box when his videotaped statement was shown. The confrontation clause does not bar the admission of the statement of a defendant, his co-conspirators, or his agents. *See, e.g., Montes v. State* (1975), 263 Ind. 390, 403, 332 N.E.2d 786, 794; *United States v. Gironda* (7th Cir. 1985), 758

F.2d 1201, 1218-1219, *cert. denied*, 474 U.S. 1004, 106 S.Ct. 523, 88 L.Ed.2d 456, *overruled on other grounds, United States v. Durrine* (7th Cir. 1990), 902 F.2d 1221; *United States v. Chappell* (7th Cir. 1983), 698 F.2d 308, 312-313, *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304. Because Klagiss had no right to confront himself, the trial court committed no error when it overruled his motion for mistrial.

Klagiss next argues that the trial court deprived him of his right to compulsory process when it quashed a subpoena which he had served on WRTV, an Indianapolis television broadcaster. Klagiss sought a copy of a videotape which contained a network news report on osteoporosis. Counsel for WRTV appeared and moved to quash the subpoena because the material on the tape was not the property of WRTV, but that of Capitol Cities/ABC, the network with which WRTV was affiliated. In addition, both the state and WRTV argued that the videotape could not be authenticated and that the individuals who prepared the tape and who expressed opinions on the tape would not be available for cross-examination. Because the tape would be thus inadmissible, they argued that the subpoena should be quashed. Counsel for Klagiss argued that he intended to use the tape in cross-examining the state's experts. The trial court quashed the subpoena.

Both the federal and state constitutions guarantee criminal defendants the right to compulsory process for obtaining witnesses in their behalf. U.S. Const. amend. VI; Ind. Const. art. 1 § 13. The right to compulsory process is subject to reasonable limitations; a criminal defendant does not enjoy an absolute right to subpoena anyone or anything for any purpose. When a defendant alleges that the right to compulsory process has been unconstitutionally limited, we must make two inquiries: 1) whether the trial court arbitrarily denied the Sixth Amendment rights of the defendant, and 2) whether the witness was competent, and his testimony was relevant and material. *Davis v. State* (1988), Ind. App., 529 N.E.2d 112, 114-115 (*citing Washington v. Texas* (1967), 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019, 1025); *see, Hunt v. State* (1989), Ind. App., 546 N.E.2d 1249, 1251.

In this case we do not find that the trial court arbitrarily denied Klagiss the right to compulsory process. Because Klagiss did not

attempt to subpoena until the Friday before the trial, counsel for WRTV was unable to present a written motion to quash. Instead, counsel presented an oral motion before the first day of the trial. The court heard argument from all parties, and allowed Klagiss the opportunity of make an offer to prove. Given the unique circumstances of this case, we believe that the trial court's actions were anything but arbitrary. The court took reasonable steps to determine whether the motion to quash should be granted, and we cannot say that the court arbitrarily granted the motion and denied Klagiss the right to compulsory process.

We further find that Klagiss fails to meet the second part of the test. Here, we are not concerned with the competency of a witness to testify. Instead we are concerned with a piece of evidence. Defense counsel stated that this evidence made certain assertions concerning the effects of osteoporosis. However, counsel for WRTV stated that no one at the station could authenticate the tape or any of the matters contained therein. It is obvious that no one with personal knowledge of the making of the tape or the accuracy of its contents would be available either to verify its accuracy or to be subject to cross-examination by the state. We find this situation similar to that posed by a witness who is incompetent to testify because of a lack of personal knowledge of the events, and we find that the trial court properly granted the motion to quash.

Even if the trial court had erred, we would find the error to be harmless. Counsel for Klagiss stated that he intended to use the tape to show to the jury during the cross-examination of the state's two doctor witnesses. He stated that the tape would assert that people with osteoporosis can suffer fractures of the spine with minimal trauma, and that he intended to ask the state's doctors whether they agreed with that assertion. He thus intended to use the tape on cross-examination in the same manner one would use a learned treatise. *See, e.g, Hess v. Lowery* (1890), 122 Ind. 225, 233-234, 23 N.E. 156, 158. This tape was not, however, a learned treatise, and such cross-examination would have been improper. Because he could not have used the tape for any purpose at trial, any error in quashing the subpoena for its production was harmless.

Klagiss asserts that his conviction was procured by perjured testimony. In support of this assertion, Klagiss notes certain alleged

inconsistencies in the testimony of Judd Green. We need not address these inconsistencies individually, because none even arguably tends to establish that Green perjured himself.

The state violates a defendant's rights to due process of law when it uses perjured testimony in order to procure a conviction. *Wallace v. State* (1985), Ind., 474 N.E.2d 1006, 1008. However, mere inconsistencies in the testimony of a witness do not lead to the conclusion that the witness committed perjury. *Id.* The jury is given the responsibility of resolving any inconsistencies which might exist. *Id.; Taylor v. State* (1981), Ind., 425 N.E.2d 141, 143.

Here, Klagiss identifies various matters as to which he asserts Green committed perjury. In each case, Klagiss identifies areas of arguable conflict in Green's testimony, but he has failed to show that the state knowingly presented perjured testimony. The jury obviously resolved any conflicts in Green's testimony in favor of conviction, and it is not our province to disturb its decision.

Next, Klagiss argues that the criminal neglect statute is void for vagueness. He claims that the statute is so vague and indefinite that people of ordinary intelligence could not determine what it prohibited.

In order to withstand a challenge that it is unconstitutionally vague, a penal statute must define the offense so that persons of ordinary intelligence can understand what it prohibits. *Rhinehardt v. State* (1985), Ind., 477 N.E.2d 89, 93, *overruled on other grounds, Stout v. State* (1988), Ind., 528 N.E.2d 476. The statute will pass muster if it "convey[s] [a] sufficiently definite warning as to the prohibited conduct when measured by common understanding." *Id.* The section of the neglect statute under which Klagiss was convicted reads as follows:

> A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> (1) places the dependant in a situation that may endanger his life or health;
>
> * * * * * *

> Commits neglect of a dependent, a Class D felony. However . . . the offense is a Class B felony if it results in serious bodily injury.

I.C. § 35-46-1-4(a). The section is clear that one charged with the care of a dependant may not knowingly place that dependant in a situation which might endanger the life or health of the dependant. A person blessed with any measure of common understanding would recognize that endangering a dependant by abusing her in a manner which caused her to die of a broken neck would violate the statute. The statute is thus not void for vagueness.

Klagiss finally challenges the sufficiency of the evidence supporting the conviction.[2] He claims that the verdict was based on mere conjecture and speculation.

When we review the evidence supporting a conviction, we may neither reweigh the evidence nor judge the credibility of the witnesses. *Washington v. State* (1982), Ind., 441 N.E.2d 1355, 1358. Where the evidence is in conflict, we are bound to view only that evidence which is most favorable to the verdict and judgment of the trial court. *Id.* If there is any substantial evidence supporting the judgment, we must affirm. *Hutchinson v. State* (1985), Ind., 477 N.E.2d 850.

In order to establish that Klagiss violated I.C. § 35-46-1-4(a) in the manner charged in the indictment, the state had to produce substantial evidence that he: 1) had care of his mother either voluntarily or by operation of law; and 2) knowingly or intentionally; 3) placed her in a situation which endangered her life or health by fracturing and displacing her C-6 vertebral body. In order to elevate the crime to a class B felony, the state had to prove that the neglect resulted in serious bodily injury.

Here, the state produced substantial evidence on each of these elements. Klagiss admitted that he moved in with his mother in order to care for her. The state showed that while she was in his care his mother died of a fractured neck. The state showed that the

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[2]Under this section of his argument, Klagiss also makes numerous complaints that the state did not attempt to elicit information favorable to his case. We simply note that the prosecution is under no obligation to negate its own case or to make a case for the defendant.

fracture would result in almost immediate death, and that Klagiss was alone with his mother immediately before she died. The state showed that Jadviga suffered numerous bruises while in the care of Klagiss, and Klagiss demonstrated that he sometimes wrenched his mother's neck in order to straighten her posture. Finally, the state showed that Jadviga's body was cleaned and repositioned after death but before the authorities were summoned.

Klagiss offers a differing view of the evidence, one which asks this court to weigh the evidence and come to a conclusion other than that reached by the jury. As an appellate court, we may not usurp the jury's prerogative and reweigh the evidence. The evidence, and the inferences which it reasonably supports, is sufficient to sustain the conviction, and, accordingly, we find no ground for reversal here.

We have found no error, and we affirm.

AFFIRMED.

CHEZEM, J. CONCURS
RUCKER, J. CONCURS IN RESULT

January 30, 1992.

THE STATE OF INDIANA, MARION COUNTY, SS:

In the Marion Superior Court,
Criminal Division Three
January, February, March 1989

THE STATE OF INDIANA)	INDICTMENT FOR:
)	
VS.)	RECKLESS HOMICIDE I.C.
)	35-46-1-5 (Class C Felony)
RAYMOND KLAGISS)	NEGLECT OF A DEPENDENT
)	I.C. 35-46-1-4 (Class B Felony)

The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that RAYMOND KLAGISS, on or about the 9th day of March, A.D. 1988, at and in the County of Marion and in the State of Indiana, did recklessly kill JUDVIGA KLAGISS by fracturing and displacing JUDVIGA KLAGISS' C6 vertebral body; all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

/s/ Stephen Goldsmith

Prosecuting Attorney
Nineteenth Judicial Circuit

COUNT II

The Grand Jurors, upon their oaths aforesaid, do further say and charge that RAYMOND KLAGISS, on or about the 9th day of March, A.D. 1988, at and in the County of Marion and in the State of Indiana, having the care of JUDVIGA KLAGISS, a dependent, did knowingly and intentionally place JUDVIGA KLAGISS in a situation that may endanger the life or health of JUDVIGA KLAGISS, to-wit: fracturing and displacing JUDVIGA KLAGISS' C6 vertebral body which resulted in serious bodily injury to JUDVIGA KLAGISS, to-wit: bodily injury which created a substantial risk of death to JUDVIGA KLAGISS; all of which is con-

trary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ Stephen Goldsmith

Prosecuting Attorney
Nineteenth Judicial Circuit

INSTRUCTION NO. 5

You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the memory, manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties, and the reasonableness of the testimony of the witness considered in the light of all of the evidence in the case.

You should attempt to apply the evidence to the presumption that the Defendant is innocent and the belief that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. However, if you find that the testimony of a witness is so unreasonable as to be unworthy of belief, or if you find conflict between the testimony of witnesses to the extent that you cannot believe all of them, then you must determine which of the witnesses you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. You may find that the number of witnesses who testify to a particular fact, on one side or the other, or the quantity of evidence on a particular point is in conflict with your own determination of the truth, and in such case you should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

INSTRUCTION NO. 6

During the trial, the Court does not intend to indicate to you by any of his rulings or comments, or otherwise, any opinion as to what facts are proven or not proven by the evidence, and any comments or remarks by the Court, or by counsel, including the opening and closing arguments of counsel, should not be considered by you as evidence in this case.

The trial of this case will proceed as follows:

First, the attorneys will have an opportunity to make opening statements to you which should be considered only as a preview of what they expect their evidence will be. Following the opening statements, witnesses will be called to testify under oath, and such oral testimony as well as any tangible exhibits duly admitted as evidence should receive your careful consideration. When the evidence is completed, counsel will present their final arguments, which will be followed by the Court's Final Instructions, after which you will retire to deliberate on your verdict.

The statutory law upon which this charge is based reads, insofar as applicable, as follows:

NEGLECT OF A DEPENDENT

"A person having the care of a dependent who knowingly or intentionally:

(1) Places the dependent in a situation that may endanger his life or health, commits NEGLECT OF A DEPENDENT. The offense is a Class B Felony if it results in serious bodily injury.

The elements of this offense are that the Defendant must:

1. Have the care of a dependent,
2. Knowingly or intentionally,
3. Place the dependent in a situation that may endanger the dependent's life or health,
4. Resulting in serious bodily injury.

The term "serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss of impairment of the function of a bodily member or organ.

INSTRUCTION NO. 9A

The rules of evidence ordinarily do not permit witnesses to testify as to opinion or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." A witness who by education and experience, has become expert in some art, science

or profession may state an opinion as to relevant and material matter in which he professes to be an expert, and may give his reason for any such opinion.

Any such opinion received in evidence in this case is not conclusive or binding on you, and should be considered in the same manner as the testimony of any other witness in this case and given such weight as you in your discretion think it deserves.

INSTRUCTION NO. 12

You must first determine the guilt or innocence of the Defendant, and if you have reasonable doubt as to guilt of the crimes charged, then you should find the Defendant not guilty.

However, if you find that the State has proven beyond reasonable doubt the material allegations of the charges against the Defendant, then you should find the Defendant guilty. Proper verdict forms will be furnished you for your use; furthermore, your sole responsibility is to determine innocence or guilt herein, and should there be a finding of guilty, sentencing responsibility is that of the trial judge alone.

1975 Ind. Acts P.L. 148 § 6:

SECTION 6. IC Title 35 is amended by adding a new article 46 to read as follows:

ARTICLE 46. MISCELLANEOUS OFFENSES

Chapter 1. Offenses Against the Family.

Sec. 1. Definitions. As used in this chapter:

"Dependent" means an unemancipated person who has not reached the age of eighteen (18) years or who is mentally or physically disabled.

"Support" means food, clothing, shelter, or medical care.

* * *

Sec. 4. Neglect of a Dependent. A person having the care, custody, or control of a dependent who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits a Class D felony.

1977 Ind. Acts P.L. 340 § 84:

SECTION 84. IC 35-46-1-1, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 1. ~~Definitions~~. As used in this chapter:

"Dependent" means:

(1) an unemancipated person who ~~has not reached the age of~~ **is under** eighteen (18) years **of age;** or

(2) **a person of any age** who is mentally or physically disabled.

"Support" means food, clothing, shelter, or medical care.

1977 Ind. Acts P.L. 340 § 87:

SECTION 87. IC 35-46-1-4, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 4. ~~Neglect of a Dependent~~. (a) A person having the care, custody, or control of a dependent who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits **neglect of a dependent,** a Class D felony.

(b) This section does not apply to a person who, in the legitimate practice of his religious belief, has provided treatment by spiritual means through prayer, in lieu of medical care, to a dependent in his care, custody, or control.

1978 Ind. Acts P.L. 144 § 8:

SECTION 8. IC 35-46-1-4, as amended by Acts 1977, P.L. 340, SECTION 87, is amended to read as follows: Sec. 4. (a) A person having the care, custody, or control of a dependent who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits neglect of a dependent, a Class D felony.

(b) ~~This section does not apply to a~~ **It is a defense that the accused** person ~~who~~, in the legitimate practice of his religious belief, ~~has~~ provided treatment by spiritual means through prayer, in

lieu of medical care, to ~~a~~ **his** dependent ~~in his care, custody, or control.~~

1980 Ind. Acts P.L. 208 § 1:

SECTION 1. IC 35-46-1-4, as amended by Acts 1978, P.L. 144, SECTION 8, is amended to read as follows: Sec. 4. (a) A person having the care, custody, or control of a dependent who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits neglect of a dependent, a Class D felony. ~~(b)~~ It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

(b) Except for property transferred or received:

(1) in connection with a proceeding under IC 31-1-11.5 or IC 31-6-5; or

(2) under IC 35-46-1-9(b);

a person who transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child commits child selling, a Class D felony.

1981 Ind. Acts P.L. 299 § 2:

SECTION 2. IC 35-46-1-4, as amended by Acts 1980, P.L. 208, SECTION 1, is amended to read as follows: Sec. 4. (a) A person having the care, ~~custody, or control of a dependent~~ **of a**

dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits neglect of a dependent, a Class D felony. It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

(b) Except for property transferred or received:

(1) **under a court order made** in connection with a proceeding under IC 31-1-11.5 or IC 31-6-5; or

(2) under IC 35-46-1-9(b);

a person who transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child commits child selling, a Class D felony.

1981 Ind. Acts P.L. 302 § 3:

SECTION 3. IC 35-46-1-4, as amended by H.E.A. 1877 of the 1981 regular session of the General Assembly, SECTION 2, is amended to read as follows: Sec. 4. (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits neglect of a dependent, a Class D felony. **However, except for a violation of clause (4), the offense is a Class B felony if it results in serious bodily injury.** It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

(b) Except for property transferred or received:

(1) under a court order made in connection with a proceeding under IC 31-1-11.5 or IC 31-6-5; or

(2) under IC 35-46-1-9(b);

a person who transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child commits child selling, a Class D felony.